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CLAIMS AGAINST GOVERNMENTS.<sup>1</sup>

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No duty of governments is more universally conceded than that of ready and complete fulfillment of their obligations. But the doctrine of the exemption of the sovereign from suit, based upon the theory that the government is always ready and willing to pay its debts without suit, practically makes the government the judge in its own cause, in violation alike of natural justice and of the rule of law existing in every other department of jurisprudence. In every other legal relation than that of the citizen claiming the fulfillment of an obligation on the part of the government it is a recognized principle that "where there is a right there is a remedy." But where the government is concerned the right of suit is of so recent origin, and is still so hampered with restrictions and limitations that

<sup>1</sup> A paper read before the World's Congress on Jurisprudence and Law Reform, at Chicago, August 9, 1893.

there are still many classes of just legal obligations of the government for the enforcement of which the only remedy lies in the uncertain chances of petition to Congress.<sup>1</sup> Fortunately, however, the time-honored maxim that "The king can do no wrong" has been declared by our highest judicial tribunal to have no existence in this country either "in reference to the government of the United States, or of the several States, or of any of their officers."<sup>2</sup> And referring to the doctrine of the exemption of the sovereign from suit it has again been said by the same high court that "It is difficult to see on what solid foundation of principle the exemption from liability to suit rests."<sup>3</sup>

And in a still earlier case the idea that the right to sue the government is a matter of favor was repudiated, and the suability of the government placed upon the just and solid ground that "It is as much the duty of the government as of individuals to fulfill its obligations."<sup>4</sup>

The framers of the Constitution were not unmindful of the necessity for providing means for adjudicating the rights of citizens against the government, and placed in that instrument among the subjects enumerated for the exercise of judicial power, "controversies to which the United States shall be a party."<sup>5</sup> Although it was never doubted that this embraced cases in which the United States were defendant as well as plaintiff, it was more than half a century before any steps were taken to make the constitutional grant of power effective by legislation providing for suits against the government.

Judge STORY, writing in 1833, says: "It has sometimes been thought that this is a serious defect in the organization of the judicial department of the national government. It is not, however, an objection to the Constitution itself, but it lies, if at all, against Congress for not having

<sup>1</sup> *Silliman v. United States*, 101 U. S. 465, 471; *United States v. McDougall's Admr.*, 121 U. S., 89, 98.

<sup>2</sup> *Langford v. United States*, 101 U. S., 341.

<sup>3</sup> *United States v. Lee*, 106 U. S., 196, 206.

<sup>4</sup> *United States v. Klein*, 13 Wall., 128, 144.

<sup>5</sup> Art. 3, § 2.

provided, as it is clearly within their constitutional authority to do, an adequate remedy for all private grievances of this sort in the Courts of the United States."<sup>1</sup>

It was not, however, till 1855 that a court was created "for the investigation of claims against the United States."<sup>2</sup> At first the "Court of Claims" was a court only in name. Its functions were confined to reporting in each case a special bill embodying its conclusions for the action of Congress. In 1863, however, it received authority to render final judgments for or against the United States,<sup>3</sup> and in 1866 such judgments were freed from a power of revision, with which the Secretary of the Treasury had at first been invested over them, and were made absolute adjudications of the liability of the government.<sup>4</sup> It has ever since taken rank with those "tribunals inferior to the Supreme Court," which Congress is empowered by the Constitution to "ordain and establish."

In 1887 concurrent jurisdiction of suits against the United States was vested in the District and Circuit Courts of the United States in a limited class of cases.<sup>5</sup> Little practical result, however, has followed from this last grant of jurisdiction, as comparatively few such suits are instituted in these courts, and the Court of Claims remains the favorite tribunal for suitors against the government.

In all this legislation the jurisdiction has been carefully limited to claims arising *ex contractu*. Claims arising from torts are by the earlier legislation impliedly,<sup>6</sup> and by the later expressly,<sup>7</sup> excluded from judicial determination. Special acts are, however, sometimes passed referring such cases to the courts in particular instances, being generally

<sup>1</sup> Commentaries on the Constitution, § 1678.

<sup>2</sup> By act of 1855, February 24, ch. 122, 10 U. S. Stat. at Large, 612; Rev. Stats., § 1049.

<sup>3</sup> By act of 1863, March 3, ch. 92, 12 U. S. Stat. at Large, 765.

<sup>4</sup> By act of 1866, March 17, ch. 19, § 1, 14 U. S. Stat. at Large, 9.

<sup>5</sup> By act of 1887, March 3, ch. 359, § 2, 1 Supp. to Rev. Stat. U. S., 559.

<sup>6</sup> *Gibbons v. United States*, 8 Wall., 269.

<sup>7</sup> By § 1 of the act of 1887, *supra*.

those of collision resulting from alleged negligence in the navigation of public vessels.<sup>1</sup>

The jurisdiction again is limited to demands for money damages, and does not embrace suits for specific performance, or for the restitution of property, real or personal.<sup>2</sup> These again are sometimes made the subject of special reference in particular cases,<sup>3</sup> though as to land in the possession of the government claimed by a private individual an action of ejectment against the officer in possession is often an available remedy.<sup>4</sup>

Interest, too, is not allowed up to the time of the rendition of judgment unless the contract expressly stipulates for it.<sup>5</sup>

No complaint can be made that this legislation is not sufficiently guarded in its protection of the interests of the government.

If we turn our attention from claims against the Federal government to those against the several States, we shall find a much less liberal allowance of the right of suit. The greatest diversity prevails among the constitutions and statutes of different States. The whole subject is within the control of each State, for the sovereign prerogative of exemption from suit belongs to each State as fully as it does to the United States. True, by the original Constitution of the United States, a State might be sued by original process in the Supreme Court of the United States by a citizen of any other State, or of a foreign nation. But this liability to suit was taken away by the Eleventh Amendment, and the Supreme Court of the United States

<sup>1</sup> Case of schooner "Ada A. Andrews," 18 Stat. L., 201; *Sampson v. United States*, 12 C. Cls., 480; Case of the schooner "Flight," 19 Stat. L., 503; *Thrush v. United States*, 14 C. Cls., 435; Case of the schooner "Dom Pedro," 20 Stat. L., 483; *Prescott v. United States*, 19 C. Cls., 684; Case of the steamer "I. N. Bunton," 25 Stat. L., 1334; *Walton v. United States*, 24 C. Cls., 372.

<sup>2</sup> *United States v. Jones*, 131 U. S., 1.

<sup>3</sup> *Hot Springs Cases*, 92 U. S., 698; *Myers v. United States*, 24 C. Cls., 448.

<sup>4</sup> *United States v. Lee*, 106 U. S., 196.

<sup>5</sup> Rev. Stat. U. S., § 1091.

has recently expressed serious doubts whether the States were ever, by a correct construction, even of the original constitution, thus subject to suit.<sup>1</sup> However this may be, there is no question that no State can now be sued in any court without its own consent, except by the United States,<sup>2</sup> by a sister State,<sup>3</sup> or by a foreign government.

While some of the State constitutions expressly provide for the bringing of suits against the State,<sup>4</sup> others expressly forbid that the State shall ever be made a defendant in any suit at law or in equity.<sup>5</sup> In a majority the old rule prevails, that no suit can be brought against the sovereign.<sup>6</sup>

Virginia claims the rank of the pioneer State in the abrogation of this antiquated injustice. "It has ever been the cherished policy of Virginia to allow to her citizens and others the largest liberty of suit against herself, and there has never been a moment since October, 1778, but two years and three months after she became an independent State, that all persons have not enjoyed this right by express statute."<sup>7</sup>

Massachusetts, too, provides for suit against the Commonwealth—a right, however, limited by judicial decision to claims arising *ex contractu*.<sup>8</sup>

New York has a "Board of Claims," which, notwithstanding its name, is a strictly judicial tribunal, having power to issue subpoenas, and to fine for contempt, and from whose judgments appeals lie to the Court of Appeals.

<sup>1</sup> *Hans v. Louisiana*, 134 U. S., 1.

<sup>2</sup> *United States v. Texas*, 143 U. S., 621.

<sup>3</sup> *Rhode Island v. Massachusetts*, 12 Pet., 657; *Florida v. Georgia*, 17 How., 478; *Alabama v. Georgia*, 23 How., 505; *Virginia v. West Virginia*, 11 Wall., 39; *Indiana v. Kentucky*, 136 U. S., 479; *Virginia v. Tennessee*, 148 U. S., 503.

<sup>4</sup> As *Indiana*, *Idaho* and *Nevada*.

<sup>5</sup> As *Alabama*.

<sup>6</sup> In the States, however, the same need of power of suing the government is not felt as in the National Government, because most public contracts are made by local corporations, which are everywhere subject to suit. Goodnow, *Comparative Administrative Law*, Vol. II, p. 166.

<sup>7</sup> *Higginbotham's Executrix v. Commonwealth*, 25 Grattan, 637.

<sup>8</sup> *Murdock Parlor Grate Co. v. Commonwealth*, 152 Mass., 28.

Its jurisdiction, while limited generally, to claims arising *ex contractu*, also extends to claims arising out of negligence in the management of canals operated by the State.<sup>1</sup>

California goes further, and by a recent statute, approved February 28, 1893, provides for bringing suit against the State for all "claims on contract, or for negligence, against the State," and allows interest to be awarded on all claims from the time the obligation accrued.

The allowance of suit for negligence, and the provision for an award of interest on claims mark a forward step in the recognition of the obligations of governments to do justice. If the new statute of California shall receive a construction as liberal as its terms seem to require, that State must be regarded as now occupying the first position in this respect of all the States of the Union.

Other States having provisions for suits against the government are West Virginia, North Carolina, Mississippi, South Dakota, Idaho and Nevada.

Passing now from our own country to England, BLACKSTONE says, in regard to the petition of right: "And, first, as to private injuries: if any person has, in point of property, a just demand upon the king, he must petition him in his Court of Chancery, where his chancellor will administer right as a matter of grace, though not upon compulsion. And this is entirely consonant to what is laid down by the writers on natural law. 'A subject,' says Puffendorf, 'so long as he continues a subject, hath no way to *oblige* his prince to give him his due, when he refuses it; though no wise prince will ever refuse to stand to a lawful contract. And, if the prince will give the subject leave to enter an action against him, upon such contract, in his own courts, the action itself proceeds rather upon natural equity than upon the municipal laws. For the end of such actions is not to *compel* the prince to observe the contract, but to *persuade* him.'" <sup>2</sup>

<sup>1</sup> Sayre v. State, 128 N. Y., 622; Sipple v. State, 99 N. Y., 284; Bowen v. State, 108 N. Y., 166; Splittorff v. State, 108 N. Y., 205.

<sup>2</sup> 1 Blackstone's Commentaries, 243.

This certainly does not give us the idea of a very strong or effective remedy, and some of the remarks of the celebrated commentator, in a later part of his work, seem still further to limit its scope, for he says that it "is of use, where the king is in full possession of any hereditaments or chattels, and the petitioner suggests such a right as controverts the title of the crown, grounded on facts disclosed in the petition."<sup>1</sup>

This apparently confines the remedy to claims for the recovery of specific property, real, or personal. Whether, indeed, the remedy were not limited to this class of cases remained a doubtful question as lately as 1874. In that year the Queen's Bench upon great consideration, and regarding the question as one of great difficulty, decided that the petition of right lay for the recovery of damages for breach of contract by the Crown.<sup>2</sup> It was said, however, that the authorities leading to this conclusion were "many of them antiquated and connected with forms of procedure with which no one now alive is familiar." A reference at this late day to such ancient authorities as alone capable of settling a point of such apparent simplicity is of the utmost significance. Nothing could more conclusively demonstrate the infrequency and the want of practical efficiency of the proceeding appointed by the English law for the redress of grievances against the government.

Nor does it appear that the "Petitions of Right Act, 1860" has removed the difficulties inherent in this form of proceeding. It is true that the procedure was simplified by that act, and assimilated to that in cases between subject and subject. The act provided, however, that it was not to "be construed to give to the subject any remedy against the Crown in any case in which he would not have been entitled to such remedy before the passing of this act." Thus the remedy, while somewhat simplified, is not enlarged by a hair's breadth.

Again, facilities are afforded the suitor in this country

<sup>1</sup> 3 Blackstone's Commentaries, 256.

<sup>2</sup> Thomas v. The Queen, L. R., 10 Q. B., 31.

by way of calls upon the executive departments for information and papers<sup>1</sup> necessary, and often indispensable for the prosecution of the suit, which are denied in England, where no rule can be made upon a department of the government for the production of papers desired by the suppliant in support of his petition of right.<sup>2</sup>

Every petition of right must first be left at the Home Department in order that it may receive Her Majesty's fiat, "Let right be done." Without this indorsement no court in England can take cognizance of the case. It has sometimes been stated, in a loose and general way, that this fiat is grantable of right, or is, at all events, refused only in special and extraordinary cases.<sup>3</sup> But from an official statement<sup>4</sup> before me, it appears that of thirty-eight petitions acted upon at that Department, from 1884 to 1889, the fiat was granted in twenty-four cases and refused in fourteen. A right to sue, which depends upon the permission of the defendant, and that permission so frequently withheld, can hardly be regarded as of great value. With us the right of suit in the Court of Claims is absolute.

General Schenck, while American Minister at London, by direction of the State Department, made some inquiries regarding the prosecution of claims against Her Majesty's government, and the result seems to have impressed him with "the doubts and difficulties in the way of the prosecution of any such claim,"<sup>5</sup> rather than with the means or facilities afforded for that purpose. This impression seems to be justified by the narrow limits within which the remedy is confined, the lack of facilities for its successful prosecution, and the infrequency with which claimants find it advisable to avail themselves of the remedy afforded.

<sup>1</sup> Rev. Stat. U. S., § 1076.

<sup>2</sup> *Thomas v. The Queen*, L. R., 10 Q. B., 44.

<sup>3</sup> *United States v. O'Keefe*, 11 Wall., 178, 184.

<sup>4</sup> Furnished through the British Legation at Washington, to Hon. William A. Richardson, Chief Justice of the Court of Claims, to whom I am indebted for permission to use it.

<sup>5</sup> Report of Hon. Wm. Lawrence, House Report No. 134, 43d Congress, 2d Session, p. 191.



No petition of right can be maintained on claims for damages caused by the negligence of public officers or servants. The rule that "The king can do no wrong" forbids the application of the maxim *respondeat superior* to the acts of the agents of the Crown.<sup>1</sup>

Still, there are some classes of cases in which the hardship, and, indeed, the utter injustice, arising from the application of this old maxim have persuaded the courts, by a sort of circuitry, to do justice by indirection where they could not do it directly. This is notably true in cases of the collision of public with private vessels, resulting in damage to the latter. This is a class of cases of lamentable frequency in this country, and of quite as lamentable failure of justice.

In England, however, a libel *in rem* may be filed against the offending vessel. The Court thereupon directs the register to write to the Lords of the Admiralty asking the entry of an appearance on behalf of the Crown, which is generally given, and the proceedings are then conducted to decree as in other cases. It is true that no warrant issues in these cases for the arrest of the vessel of the Crown, but the proceedings are strictly judicial; the suits are instituted and conducted on the hypothesis that claims against the offending vessel are created by the collision; and while the vessels are not taken into custody it is presumed that the government will at once satisfy a decree rendered by its own tribunals in a case in which it has voluntarily appeared.<sup>2</sup>

With us no officer of the government is authorized to enter an appearance, and hence an act of Congress has to be asked for, giving a special jurisdiction in the particular case. Why the subject could not be dealt with upon general lines instead of making each case a matter of grace and favor it seems difficult to see. The only explanation is to be sought in the vicious habit on the part of Congress

<sup>1</sup> Viscount Canterbury *v.* Attorney General, 1 Phillips, 306.

<sup>2</sup> The "Athol," 1 W. Robinson, 382, cited and fully commented on in the "Siren," 7 Wall., 152.

of dealing out justice by piecemeal, and by way of individual favor, where it ought to be administered by general laws applicable alike to high and low.

So again where public works are in their construction and operation under the charge of Boards of Commissioners, invested with the necessary powers by acts of Parliament, and error or neglect occurs, causing damage to individuals, the commissioners, or members of the board, are held liable, but the damages are paid out of government funds in their hands.<sup>1</sup> This might be regarded as more similar to suits against municipal corporations than to claims against governments. This is true so far as the form of the action is concerned, but in reality it seems to be more in the nature of a claim against the government itself. Such works are usually with us under the charge of the corps of engineers of the army in connection with the improvement of rivers and harbors. These works are large, and of growing magnitude and importance, but no adequate provision is made in our laws for redress where the property of the citizen is taken or injured in the course of the operations.

Many of the colonies of England have extended the right of suit against the Crown, which is in effect a suit against the government of the colony, far beyond the measure of redress granted by the jurisprudence of the mother country. In the island of Ceylon a very extensive practice of suing the Crown on contract had sprung up, and had been recognized in hundreds of decisions. It was thought to have been derived from the Roman-Dutch law in force in Ceylon prior to the British conquest in 1799. It was not quite clear whether that law did really allow such suits, but whether it did or not, the right was put on a firm basis by a legislative ordinance of the colony adopted in 1868, which in specific terms conferred jurisdiction of such suits upon the district courts of the island,

<sup>1</sup> *Mersey Docks Trustees v. Gibbs*, L. R., 1 H. L., 93; *Addison on Torts*, ch. 16, s. 14, §§ 1043, 1047.

thus recognizing the right so specifically as to confer the jurisdiction even if by pre-existing law there were none.<sup>1</sup>

A statute of New South Wales<sup>2</sup> entitled "An Act to enforce claims against the Colonial Government and to give costs in Crown suits" provides that "any person having, or deeming himself to have, any claim or demand whatever against the government of this Colony may set forth the same in a petition to the governor, praying him to appoint a nominal defendant in the matter of such petition," and then authorizes the governor to name a nominal defendant, but if he does not do so within one month the Colonial Treasurer is to be the defendant. "In any action or suit under this Act all necessary judgments, decrees and orders may be given and made, and shall include every species of relief, whether by way of specific performance, or restitution of rights, for recovery of lands or chattels, or payment of money or damages."

The Colonial Treasurer is to pay all damages and costs awarded in such cases out of any moneys in his hands legally applicable thereto, "and in the event of such payment not being paid within sixty days after demand execution may be had for the amount and the same may be levied upon any property vested in the government of this Colony."

The Privy Council thus construes this statute: "Thus unless the plain words are to be restricted for any good reason, a complete remedy is given to any person having, or deeming himself to have, any just claim or demand whatever against the government. These words are amply sufficient to include a claim for damages for a tort committed by the local government by their servants."

The reason is then given for the distinction between the colonial law and that of England, as follows: "It must be borne in mind that the local governments in the colonies, as pioneers of improvements are frequently obliged to

<sup>1</sup> *Appu v. Queen's Advocate*, 9 App. Cas., 571.

<sup>2</sup> 39 Victoria, No. 38.

embark in undertakings which in other countries are left to private enterprise, such, for instance, as the construction of railways, canals and other works for the construction of which it is necessary to employ inferior officers and workmen. If therefore the maxim that 'The king can do no wrong' were applied to colonial governments in the way now contended for by the appellants it would work much greater hardship than it does in England."<sup>1</sup>

Here we have a broad admission that the old maxim does work hardship in England coupled with a bold act of legislation abrogating the rule in the colonies, and a broad and liberal rule of judicial construction applied to that legislation. To my mind, however, the most remarkable feature of the legislation is one not adverted to in the decision which I have quoted. This is the subjection of the government of the colony to the issuance of an execution in case of non-payment within sixty days.

In England, and in this country alike, "The proceedings end with the recovery of the judgments. After they are obtained it depends in England upon the Parliament, and in this country on Congress whether or not they shall be paid."<sup>2</sup> The suitor, even after obtaining his judgment, must still approach the sovereign on bended knee, a "suppliant" as he is most appropriately termed in England, a "petitioner" in this country, with a humble prayer for payment of the sum judicially awarded. But the Australian suitor may of right demand immediate payment of his judgment, and may seize the colonial property in case of default with little more ceremony or delay than he would that of John Doe or Richard Roe.

The law of the Straits Settlements<sup>3</sup> and of New Zealand<sup>4</sup> is similar. In these colonies suits against the Crown, both on contracts and torts, are freely permitted. While these colonies still acknowledge the dominion of the Crown, though they may not like us have adopted a

<sup>1</sup> *Farnell v. Bowman*, 12 App. Cas., 643.

<sup>2</sup> *United States v. O'Keefe*, 11 Wall., 178, 184.

<sup>3</sup> *Attorney General v. Wemyss*, 13 App. Cas., 192.

<sup>4</sup> *The Queen v. Williams*, 9 App. Cas., 418.

Declaration of Independence, yet the "right divine of kings to govern wrong" must still be regarded as more in force in this country than there, so long as our laws permit officers of the government in any case to ride rough shod over the rights of citizens without redress.

It is not quite clear whether Canada has yet come up to the same ample measure of justice. Suits against the Crown on contract are freely allowed there,<sup>1</sup> and the government has been held liable for damages to water works by the construction of a government dam.<sup>2</sup> A recent statute gives the Court of Exchequer jurisdiction of "every claim against the Crown arising out of death or injury to the person or property on any public work resulting from the negligence of any officer or servant of the Crown, while acting within the scope of his duties or employment."<sup>3</sup> The construction of this statute is probably as yet unsettled, but if construed with the same spirit of fairness and liberality as that of New South Wales it shows that our northern neighbor has come up to the position which neither England nor this country has yet been willing to take, that the government cannot assume the powers and privileges of an owner of property without also being subjected to the responsibilities incident to such ownership.

The law of France differs so greatly from ours and that of England in its separation of the *droit administratif* from the ordinary law of the land that it is far from easy to say to what extent its law, as compared with that of England and of the countries which are or have been English colonies, offers a speedy, practical and efficient remedy to claimants against the government. Certain it is that "an individual in his dealings with the State does not, according to French ideas, stand on anything like the same footing on which he stands in dealing with his neighbor.

"A, for example, being a private person, enters into a contract with X, also a private person. X breaks the

<sup>1</sup> *Humphrey v. The Queen*, 20 Canada Sup. Ct., 591.

<sup>2</sup> *The Queen v. St. John Water Commissioners*, 19 Canada Sup. Ct., 125.

<sup>3</sup> *The Queen v. Martin*, 20 Canada Sup. Ct., 240.

contract. A has a right to recover from X damages equivalent to the gain which A would have made if X had kept to his bargain.

"A enters into an exactly similar contract with N, an official acting on behalf of some department of the government. N, or in fact the department, breaks the contract. A has a right to claim from the government, not, as in the case of the action against X, damages equivalent to the gain which he would have made if the contract had been kept, but only damages equivalent to the loss (if any) which A may have actually suffered by the breach of contract. In other words, the State, when it breaks a contract, ought, according to French ideas, to suffer less than would a private wrong-doer.

"In the example here given, which is merely one among a hundred, the essential character of *droit administratif* become apparent—it is a body of law intended to preserve the privileges of the State."<sup>1</sup>

In dealing with war claims it must be acknowledged that the government of France has taken a position far superior to that of our own. Immediately after the Franco-Prussian War, the National Assembly passed laws for the indemnification of all persons who had suffered losses during the German invasion. In the administration of this law the most liberal spirit was manifested. No distinction was made on account of the cause of the damages. All persons who had suffered material losses in consequence of the war were allowed to present their claims. There was no kind of damage resulting from the war for which relief was not granted, and that without respect to persons. Foreigners—even Germans as well as others—were allowed to receive a share of the indemnity granted. Well might our *Chargé d’Affaires* at Paris, in transmitting official information on this subject, remark: "A captious spirit might suggest that this was intended as a hint to us to do likewise."<sup>2</sup>

<sup>1</sup> Dicey, *Law of the Constitution*, pp. 308, 309.

<sup>2</sup> Letter of the Duke Decazes to Minister Washburn, House Report No. 134, 43d Cong., 2d Sess., pp. 74-76.

Though the Franco-Prussian war was not begun till our own civil war had been five years ended, the war claims of France have been for many years settled and adjusted, instead of hanging on like our own into well nigh a third of a century. Grossly as the amount of these claims has been exaggerated on the stump, and even in official reports, it still remains true that there are several millions of them pending before the courts unadjusted, and even a large number of adjudicated claims upon which no action has been taken by Congress.<sup>1</sup>

Claims against governments on the part of foreigners are often settled through the agency of mixed International Commissions. While such commissions are admirable instrumentalities for the settlement of great national controversies like the Behring Sea question, they are unsatisfactory tribunals for the adjudication of private rights. The ideas of international law prevailing in one commission may be, and often are, totally different from those governing another. Their expenses are always heavy, often quite out of proportion to the amount of business transacted. In more than one instance the defendant government has made charges of fraud, and has demanded—whether with justice or not, it would be improper here to suggest—a re-examination of so much of the proceedings as adversely affected her.<sup>2</sup> With the adoption by every country of a complete system of remedial justice in cases of government claims, in the due execution of which foreign governments and their citizens could have confidence, the necessity for these temporary and exceptional tribunals would disappear, and there would be no more occasion for diplomatic intervention in the settlement of claims against foreign governments than in that of claims against private citizens of a foreign nation.

<sup>1</sup> The laws and statistics in regard to war claims are admirably summarized in a speech of Hon. Benjamin A. Enloe, of Tennessee, in the House of Representatives, January 16, 1893. Cong. Rec., 52d Cong., 2d Sess., pt I pp. 607-610.

<sup>2</sup> 22 U. S. Statutes at Large, 643; 27 id., 409, 410.

In any new legislation on the subject of claims there should be an abrogation of the unjust prohibition against allowing interest, except where expressly stipulated for *eo nomine*. In cases where the payment of a specific sum at a definite time is agreed upon, the damage arising from the delay constitutes a grievance as actual as the non-payment of the principal sum. The redress afforded for this grievance by the ordinary law of the land against a private defendant is the allowance of legal interest. The only reason for denying it against the government is an absurd legal tradition that the government is always ready and willing to pay its debts. This in turn rests upon the maxim invented by court sycophants that "to know an injury and to redress it are inseparable in the royal breast." Such time-honored falsehoods are small comfort to a government contractor sorely pressed, and perhaps ruined, by the failure of the government to pay him money which he is obliged himself, meanwhile, to replace in his business at high rates of interest. The government should place itself on the plane of justice in this respect, and give compensation where it has been guilty of unreasonable delay.

The courts should also be invested with authority to pass upon claims arising from torts where these arise out of negligence of the officers and agents of the government in the construction or operation of public works. Even in England the denial of a remedy in such cases, in accordance with the rule that "the king can do no wrong," is treated as a mere local rule of English law, and as inapplicable to most if not all of her colonies.<sup>1</sup>

<sup>1</sup> A learned authority thus states the continental rule on this subject, which it will be observed is in striking accordance with Attorney-General Cushing's opinion, cited in the text (*post*, p. 1015): "On the continent the rule is, that the government is liable to be sued by an individual in contract and also in tort, where the tortious act is not committed in the performance of functions of a distinctly public legal character, and where the fault of the officer causing it is not purely personal to himself, but consists rather in bad service, in an order badly given, not understood, or imprudently or carelessly executed. Thus the government would not be held



Judge COOLEY evidently repudiates the application of this maxim in these cases, for in treating of torts he says : " Even the State or the general Government may be guilty of individual wrongs ; for, while each is a sovereign, it is a corporation also, and as such capable of doing wrongful acts. The difficulty here is with the remedy, not with the right. No sovereignty is subject to suits, except with its own consent. But either this consent is given by general law, or some tribunal is established with power to hear all just claims. Or, if neither of these is done, the tort remains ; and it is always to be presumed that the legislative authority will make the proper provision for redress when its attention is directed to the injury." <sup>1</sup> And Attorney-General CUSHING, in a profound opinion delivered in 1855, draws a distinction between two classes of officers engaged in the transaction of public affairs : " One employed in the collection of the revenues and to the care of the public property, who represent the proprietary interests of the government, and another class who are the agents of society itself, and are appointed by the government only in its relation and capacity of *parens patriæ*. For the acts of the former the government holds itself responsible in many cases because their acts are performed for the immediate interests of the government. But, for the acts of the latter, no government holds itself pecuniarily responsible." <sup>2</sup>

Surely it is time that our government should take rank with those progressive countries which have abandoned the idea, worthy only of a despot, that governments may enjoy all the advantages and privileges connected with the

responsible for damages caused by its agents in the collection of taxes, while it would be if a ship were injured by the negligence of the officers of one of its men-of-war." Comparative Administrative Law, by Prof. Frank J. Goodnow, Vol. II, p. 161, a valuable and interesting work, which just reaches me as this paper goes to press.

<sup>1</sup> Cooley on Torts, p. 122.

<sup>2</sup> 7 Opinions of Attorneys General, 229, 237, 238. See, also, the able reports of Senator Pike on the case of John Williams, Sen. Rep., 825, 49th Cong., 1st Sess., and of Senator Hoar on the case of the steamer "I. N. Bunton," Sen. Rep., 2692, 50th Congress, 2d Sess., holding the same view.

ownership of property while they evade the responsibilities inherent in such ownership.

The time must come when the citizen injured by the mismanagement of government property, whether it be by such an accident as the recent one at the Ford's Theatre Building in Washington, or by the collision of a vessel with an armed ship of the United States, or with the piers of a dam, or by any other of the ways in which government property may be so used as to cause damage to others, shall have a legal right of redress against the government whose officers or agents have caused the injury, instead of being remitted as now to the mere exercise of legislative favor and discretion.

In the line of the improvement of our own policy in dealing with claims, I would put in the fore-front the idea of an exclusion of any attempt on the part of the legislative authority to deal with special cases. Congress, under the Constitution, is organized with reference to the great subjects of national legislation. On these topics it has every facility for full inquiry, thorough debate and right decision. But it is not a court, and has neither the organization nor the machinery to enable it to deal successfully with the adjustment of private rights. The limits of a session are far too brief for the full consideration of the important measures of general public interest affecting the finance, the commerce, the public health, the diplomatic relations, and the hundred other great interests of the country confided to the charge of Congress. That a national legislature, pressed with such public duties, should, in addition, undertake the task of passing separately upon the validity of private claims, ranging from millions in amount to such demands as for the value of a horse, or a hundred cords of wood, is such an absurdity as to seem incredible, were it not unhappily a matter of daily experience during the sessions of Congress.

No other legislature in the world attempts such a thing. Our own certainly does not succeed in the performance of it. Not one in ten of the claims reported to

the House of Representatives by its committees are ever considered by that body at all. Such as are usually get before the House by unanimous consent, or under a suspension of the rules, thus going through in spite of, rather than in accordance with, settled principles of legislative action.

It is not that the claims are not just, for many if not most of them are; nor that members of Congress desire to be encumbered with these duties, for many of them would gladly be rid of these onerous burdens on their time and patience.

A more thankless duty than that of a member of the House Committee on Claims or War Claims it would be difficult to imagine. Suppose such a member devotes himself for a whole session, as many of them do, with painstaking care to the examination of the cases coming before his committee. He will probably find little difficulty in getting his recommendations adopted by his committee, and by them reported to the House. When, however, he sees week after week and month after month pass by, and his carefully studied reports completely ignored, or even if called up for adoption defeated by a hasty, passionate or unintelligent objection, he may well grow discouraged and become so disgusted at the whole system as to be unwilling to continue the work of Sisyphus rolling the stone up hill only to see it roll down again; for the end of one brief Congress annuls all the work of the committees that has not been consummated into law, and in the next Congress the whole has to be gone over again. Under such disheartening circumstances the only wonder is that the work of these committees is so well and thoroughly done as it generally is.

Nor is the evil much remedied by the passage of laws such as the so-called "Bowman Act,"<sup>1</sup> or "French Spoliation Act,"<sup>2</sup> conferring upon the Court of Claims a jurisdic-

<sup>1</sup> 1883, March 3, ch. 116, Supp. to Rev. Stat. U. S., 403; and the similar provisions of 1887, March 3, ch. 359, Sec. 12, 14, 1 Supp. to Rev. Stat. U. S., 561, 562.

<sup>2</sup> 1885, January 20, ch. 25, 1 Supp. to Rev. Stat. U. S., 471.

tion of an "ancillary" or "advisory" character.<sup>1</sup> Under these acts the Court finds facts and conclusions of law, or both, and without entering any judgment merely reports them for further action. Such laws put the cart before the horse. Instead of defining the liability of the United States, and then leaving suitors to bring their cases within that definition if they can, they provide for a litigation which determines nothing, and is binding upon no one. They are unjust to the claimants in inviting them into the courts to establish their claims, without affording the slightest security for the attainment of any substantial result in case of their success in the litigation. They are equally so to the government in not giving it an absolute security against the resuscitation of a claim once by competent authority judicially overruled.

The true field for the exertion of the powers of Congress on the subject of claims is to be found in defining the liability of the government by general laws applicable to all claimants. This is a field for statesmanship worthy to employ the ablest minds in either house of the national legislature. Those whose claims are within the principles of liability thus defined should obtain the substantial fruits of their litigation by getting an absolute and binding judgment against the government. Those whose claims cannot pass the test of liability thus defined in advance should be saved the expense and trouble of bringing their cases before the courts.

The task of defining the liability of the government is not one of insuperable difficulty. True, there are some difficulties in questions of governmental liability, owing to the peculiarity of the various branches of the administrative machinery of the government, but, after all, the underlying principles do not radically differ from those governing the transactions of private parties.

Again and again have matters which were thought to be proper subjects for legislative action been brought within the scope of general law, and always with the

<sup>1</sup> *In re Sauborn*, 148 U. S., 222, 226.

greatest advantage to both the government and the citizen.

Acts of attainder were at one time defended on the ground that the ordinary criminal law might not always be sufficient, and that the power should be reserved to the legislature to deal with special cases of exceptional gravity.

In the case of Sir John Fenwick we are told by Macaulay: "The opponents of the bill did not, indeed, venture to say that there could be no public danger, sufficient to justify an act of attainder. They admitted that there might be cases in which the general rule must bend to an overpowering necessity."<sup>1</sup>

But custom in England, and the written constitution here, forbid the passage of such laws now, and crime instead of being more secure from punishment is less frequent, and is more certain, when committed, to be punished.

Special acts of divorce were once regarded as within the legitimate sphere of legislative activity,<sup>2</sup> but that notion has long since been exploded, and divorces are now regarded as properly grantable only by the courts, and in specific cases defined by general law.

Even charters of incorporation, once regarded as among the highest acts of sovereignty, and grantable only by special legislation, are now conferred under general laws, which have relieved such charters from the odium attached to special acts of legislative favoritism and monopoly.

That claims against the government should be equally brought within the scope of general legislation, and that all arbitrary, special and exceptional measures of relief should be entirely done away with, ought, I should think, to be a truism so forcible as only to be stated to command assent.

With the liability of the government defined in advance by laws equally applicable to all, and with an impartial tribunal meting out equal justice to every suitor, irrespective of political influence or personal solicitation,

<sup>1</sup> Macaulay, *History of England* (Harpers' edition), Vol. v, p. 199.

<sup>2</sup> *Maynard v. Hill*, 125 U. S., 190.

no citizen can have just cause of complaint. Hardships will, indeed, occur, but hardships are inseparable from every system of human justice. Better, far better, were it that occasional instances of this kind should happen than that the time and attention of the national legislature should be in such large measure occupied as it is now in the consideration of purely private and personal interests. Better were it, too, that the claimant having even a just and honest demand should learn once for all, if need be, that he must fail in law, than that he should be kept waiting for tedious years knocking at the doors of Congress, only to lose his case by an adjournment just before his bill is reached, or by a "pocket veto," happening only because a weary President has not the time to devote to the consideration of his measure, or by any of the thousand legislative accidents on which the fate of private bills in Congress so largely turn. The congressional claimant is an anomalous survival from the past. There should be no place for him in a land where laws are based upon equal and exact justice.

The ruling idea which should govern all legislation on the subject of claims should be the absolute removal of private demands against the government from the sphere of arbitrary power, political partisanship, or personal favoritism into the domain of general law.

*Washington, D.C.*